

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, MEHDI
OSTADHASSAN, HANIN OMAR
BENGEZI, MUSHTAQ ABED
JIHAD, and SAJEEL MANZOOR,
on behalf of themselves and others
similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the
United States; UNITED STATES
CITIZENSHIP AND
IMMIGRATION SERVICES, *et al.*,

Defendants.

CASE NO. C17-0094-RAJ

ORDER

This matter comes before the Court on Defendants' motion to dismiss (Dkt. No. 56) and Plaintiffs' amended motion for class certification (Dkt. No. 49). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS IN PART and DENIES IN PART Defendants' motion to dismiss and GRANTS Plaintiffs' motion for class certification for the reasons explained herein.

1 **I. BACKGROUND**

2 This section summarizes the facts as set forth in Plaintiffs’ second amended
3 complaint, as is appropriate on a motion to dismiss.

4 **A. The CARRP Policy**

5 This lawsuit is brought by immigration applicants to challenge an allegedly secret
6 and unlawful government program, the Controlled Application Review and Resolution
7 Program (CARRP). (Dkt. No. 47 at ¶¶ 1, 9.) The premise of Plaintiffs’ suit is that because
8 the Constitution expressly assigns the authority to establish uniform rules of
9 naturalization to Congress—which Congress has done in the Immigration and Nationality
10 Act (INA)—the United States Citizenship and Immigration Service (USCIS), as part of
11 the executive branch, has created an extra-statutory, unlawful, and unconstitutional
12 program in CARRP. (*Id.* at ¶¶ 1, 8, 9.)

13 Plaintiffs allege that USCIS created CARRP in 2008 “as an agency-wide policy to
14 identify, process, and adjudicate certain immigration applications that allegedly raise
15 ‘national security concerns.’” (*Id.* at ¶ 55.) They allege that CARRP implements “an
16 internal vetting policy that has not been authorized by Congress, nor codified, subjected
17 to public notice and comment, or voluntarily made public in any way.” (*Id.* at ¶ 10.) In
18 fact, CARRP was unknown to the public until it was discovered in litigation challenging
19 a denial of naturalization in *Hamdi v. USCIS*, 2012 WL 632397 (C.D. Cal. Feb. 25,
20 2012). The only information about CARRP that USCIS made public was in response to
21 Freedom of Information Act (FOIA) requests and the litigation necessary to compel those
22 responses. *See ACLU of S. Cal. v. USCIS*, No. 13-cv-0861 (D.D.C., filed June 7, 2013).

23 The policy imposes criteria to determine when an individual should be labeled a
24 “national security concern” that Plaintiffs claim “are vague and overbroad, and often turn
25 on discriminatory factors such as religion and national origin.” (Dkt. No. 47 at ¶¶ 62–76.)
26 The criteria also include many lawful activities such as donating to Muslim charities or

1 travelling to Muslim-majority countries. (*Id.* at ¶¶ 35–51, 62–76.) Plaintiffs maintain
2 these criteria are “untethered from the specific statutory criteria Congress has authorized
3 to determine when a person is eligible for immigration benefits.” (*Id.*)

4 Even if an applicant meets all the statutory requirements for citizenship or
5 adjustment of status under the INA, USCIS officers are instructed that an application in
6 CARRP cannot be approved. (*Id.* at ¶ 77.) If an applicant meets one of CARRP’s national
7 security concern criteria, officers are guided to deny the application or delay it as long as
8 possible. (*Id.* at ¶¶ 77, 78–97.) The applicant is neither informed that her application has
9 been submitted to CARRP, nor able to challenge her classification as a national security
10 concern. (*Id.* at ¶¶ 61, 96.) Ultimately, Plaintiffs allege that CARRP creates a substantive
11 regime for immigration application processing and imposes “eligibility criteria that
12 indefinitely delay adjudications and unlawfully deny immigration benefits to noncitizens
13 who are statutorily eligible and entitled by law.” (*Id.* at ¶ 95.)

14 **B. The President’s Executive Orders**

15 Although recent court decisions across the country¹ may make Defendant
16 President Trump’s (hereinafter “the president”) recent Executive Orders a non-issue, the
17 Court will briefly address their impact on this case.

18 Plaintiffs initiated this lawsuit on January 23, 2017, challenging only the CARRP
19 program. (Dkt. No. 1.) On January 27, 2017, the president issued Executive Order (E.O.)
20 13769, entitled “Protecting the Nation from Foreign Terrorist Entry into the United
21 States.” 82 Fed. Reg. 8977. Section 3(c) of the E.O. suspended entry into the United
22 States of citizens or nationals of Syria, Iraq, Iran, Yemen, Somalia, Sudan, and Libya. *Id.*

24 ¹ See, e.g., *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (upholding a temporary
25 restraining order which enjoined portions of Executive Order 13769); *Int’l Refugee Assistance*
26 *Project v. Trump*, 2017 WL 2273306 (4th Cir. May 25, 2017) (upholding preliminary injunction
enjoining portions of Executive Order 13780); *Hawai’i v. Trump*, 2017 WL 2529640 (9th Cir.
June 12, 2017) (upholding preliminary injunction enjoining portions of Executive Order 13780).

1 at 8978. USCIS initially determined that E.O. 13769 required it to suspend taking action
2 on all pending applications—except those for naturalization—of nationals from those
3 seven countries. (*See* Dkt. No. 47 at ¶ 15; Dkt. No. 56 at 20; Dkt. No. 17 at ¶ 3.) Section
4 4 of E.O. 13769 called for the Secretaries of State and Homeland Security and the
5 Directors of National Intelligence and the FBI to “implement a program, as part of the
6 adjudication process for immigration benefits, to identify individuals seeking to enter the
7 United States on a fraudulent basis with the intent to cause harm, or who are at risk of
8 causing harm subsequent to their admission.” 82 Fed. Reg. at 8978.

9 In response to E.O. 13769, Plaintiffs amended their complaint to challenge
10 sections 3(c) and 4 of the order. (Dkt. No. 17.) Plaintiffs alleged that USCIS relied on
11 section 3 to suspend processing immigrant visas and other immigration benefits. (*Id.* at
12 ¶ 54.) Plaintiffs also alleged that Section 4 of the E.O. “directs federal agencies to create
13 and implement a policy of extreme vetting of all immigration benefits applications” and
14 that “[a]ny such ‘extreme vetting’ policy” would expand CARRP. *Id.* at 8978–79; Dkt.
15 No. 17 at ¶ 4. The day after Plaintiffs filed their amended complaint, USCIS Acting
16 Director Lori Scialabba sent a memo to all USCIS employees stating that section 3(c) did
17 not affect the immigration applications of individuals based on the country of their
18 nationality. (Dkt. No. 22 at 2–3.) In their notice of related cases, Plaintiffs stated that if
19 USCIS adhered to the position expressed by Acting Director Scialabba, “it would appear
20 that the Section 3(c) claims in this action may become moot.” (*Id.* at 3.)

21 After the Ninth Circuit upheld a temporary restraining order enjoining portions of
22 E.O. 13769 in *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), the president
23 promised to “go[] further” with a new executive action, and assured that “[e]xtreme
24 vetting will be put in place,” and that “it already is in place in many places.” (Dkt. No. 47
25 at ¶ 115.) The president then issued E.O. 13780, which rescinded E.O. 13769 in its
26 entirety. 82 Fed. Reg. 13209, 13218 (March 6, 2017). Stephen Miller, the president’s

1 Senior Advisor stated that E.O. 13780 would have “the same basic policy outcome for the
2 country.” (Dkt. No. 47 at ¶ 117 (citation omitted)). Sean Spicer, the president’s Press
3 Secretary, stated that the goal of E.O. 13780 was “obviously to maintain the way we did
4 it the first time.” (*Id.* at ¶ 118 (citation omitted)).

5 Portions of the second E.O. were soon after enjoined in *Hawai’i v. Trump*, 2017
6 WL 10111673 (D. Haw. Mar. 15, 2017). There, the court concluded that there was
7 “significant and un rebutted evidence of religious animus driving the promulgation of
8 [E.O. 13780] and its related predecessor.” *Id.* at *11. Based on this, “a reasonable,
9 objective observer . . . would conclude that [E.O. 13780] was issued with a purpose to
10 disfavor a particular religion.” *Id.* at *13. The Ninth Circuit largely upheld the district
11 court’s order, finding that the plaintiffs were likely to succeed on their claims that the
12 second E.O. “contravened the [Immigration and Nationality Act (INA)] by exceeding the
13 president’s authority under § 1182(f), discriminating on the basis of nationality, and
14 disregarding the procedures for setting annual admissions of refugees.” *Hawai’i v.*
15 *Trump*, 2017 WL 2529640, at *23 (9th Cir. June 12, 2017).

16 Following the issuance of E.O. 13780, Plaintiffs filed a second amended complaint
17 which added three named plaintiffs and a challenge to E.O. 13780, alleging that it
18 “sanctions a major expansion of the existing CARRP program.” (Dkt. No. 47 at ¶¶ 18,
19 26–28.)

20 **C. Named Plaintiffs**

21 All named Plaintiffs are foreign nationals from Muslim-majority countries, and
22 have applied for naturalization or adjustment of status. (*Id.* at ¶¶ 24–28.)

23 Plaintiff Wagafe is a Somali national and former lawful permanent resident. (*Id.* at
24 24.) He applied for naturalization in November 2013 and, although he met the statutory
25 criteria for naturalization, his application was submitted to CARRP. (*Id.* at ¶¶ 24, 142–
26 161.) There his application remained, until five days after Plaintiffs moved for class

1 certification, at which point he was contacted by USCIS and an interview was scheduled.
2 (*Id.* at ¶ 24) Within two weeks, he became a U.S. citizen. (*Id.*)

3 Plaintiff Ostadhassan is an Iranian national, and a Professor at the University of
4 North Dakota, who meets all the statutory requirements to adjust his status to that of a
5 lawful permanent resident. (*Id.* at ¶¶ 25, 162–175.) His application was submitted to
6 CARRP. (*Id.* at ¶¶ 25, 170.) Prior to this lawsuit, Mr. Ostadhassan waited over three and
7 a half years for a decision on his application. (*Id.* at 175, Dkt. No. 58 at 12.) On April 5,
8 2017, one day after Plaintiffs filed their second amended complaint, USCIS notified Mr.
9 Ostadhassan of its intent to deny his application. (Dkt. No. 58 at 3; Dkt. No. 53 at 1.)

10 Plaintiff Bengezi is a Libyan national married to a United States citizen. (Dkt. No.
11 47 at ¶ 26.) In February 2015, she applied for adjustment to lawful permanent resident
12 status. (*Id.*) Her application was submitted to CARRP. (*Id.* at ¶¶ 26, 196.) Soon after
13 being added as a named plaintiff, USCIS notified her that her interview had been
14 scheduled. (Dkt. No. 58 at 12.) USCIS approved her application on May 9, 2017. (Dkt.
15 No. 60 at 10; Dkt. No. 60-2.)

16 Plaintiff Jihad is an Iraqi refugee who has resided in Washington since 2008. (Dkt.
17 No. 47 at ¶¶ 27, 199–204.) His lawful permanent resident status became effective upon
18 arrival in the United States. (*Id.* at ¶ 205.) He applied for naturalization in July of 2013
19 and satisfied all of the statutory criteria, yet his application was submitted to CARRP. (*Id.*
20 at ¶¶ 26, 206–17.) Over three years passed with no action on Mr. Jihad’s application.
21 (Dkt. No. 58 at 12.) On April 4, 2017, Mr. Jihad was added as a named Plaintiff. (Dkt.
22 No. 47.) He received an interview notification on April 13, 2017 and was interviewed on
23 April 25, 2017. (Dkt. No. 58 at 12.) USCIS approved his application on May 9, 2017 and
24 he took his oath of citizenship on May 30, 2017. (Dkt. No. 60 at 10; Dkt. No. 60-4.)

25 Plaintiff Manzoor is a Pakistani national who has lived in the United States since
26 2001. (Dkt. No. 47 at ¶ 28.) He came to the United States to obtain his Master of Science

1 in Marketing Research from the University of Texas and was later granted an H-1B work
2 visa. (*Id.* at ¶¶ 221–22.) He applied for naturalization in 2015 and meets the statutory
3 criteria; his application was submitted to CARRP. (*Id.* at ¶¶ 228–34.) No action was
4 taken on his application, however on May 1, 2017, less than a month after being added as
5 a named plaintiff, Mr. Manzoor was interviewed and his application was approved on the
6 spot. (Dkt. No. 58 at 12.) He took his oath of citizenship the same day. (Dkt. No. 60-5.)

7 **D. Defendants’ Motion to Dismiss (Dkt. No. 56)**

8 In response to Plaintiffs’ second amended complaint, Defendants now bring this
9 motion to dismiss all claims for two reasons. (Dkt. No. 56.) First, Defendants maintain
10 that under Federal Rule of Civil Procedure 12(b)(1) this Court lacks subject matter
11 jurisdiction because (1) Plaintiffs lack standing, and (2) Plaintiffs’ claims are moot. (*Id.* at
12 10–11.) Second, Defendants argue that under Federal Rule of Civil Procedure 12(b)(6),
13 Plaintiffs have failed to state a claim upon which relief may be granted for Claims Four,
14 Seven through Nine, and any claims challenging “extreme vetting.” (*Id.* at 11.)

15 **E. Plaintiffs’ Motion for Class Certification (Dkt. No. 49)**

16 After filing the second amended complaint, Plaintiffs filed the present amended
17 motion for class certification. (Dkt. No. 49.) Plaintiffs argue that “[t]hrough CARRP, the
18 government surreptitiously blacklists thousands of applicants who are seeking
19 immigration benefits, labeling them ‘national security threats.’” (*Id.* at 8.) In addition to
20 themselves, “[t]housands of individuals . . . have had their applications for naturalization
21 or adjustment of status halted, delayed, or denied by CARRP.” (*Id.* at 9.) Accordingly,
22 Plaintiffs maintain that class treatment is the appropriate avenue through which to
23 “challenge CARRP and any other successor ‘extreme vetting’ program that the Executive
24 branch may seek to implement pursuant to Sections 4 and 5 of the Second EO or through
25
26

1 other extra-statutory means.”² (*Id.*)

2 Pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), Plaintiffs
3 Wagafe, Jihad, and Manzoor move the Court to certify the following class, and appoint
4 them as class representatives:

5 A national class of all persons currently and in the future (1) who have or
6 will have an application for naturalization pending before USCIS, (2) that is
7 subject to CARRP or a successor “extreme vetting” program, and (3) that has
8 not been or will not be adjudicated by USCIS within six months of having
9 been filed.

10 (*Id.*) For simplicity, the Court refers to the above putative class as the “Naturalization
11 Class.” Additionally, Plaintiffs Ostadhassan and Bengezi move the Court to certify the
12 following class and appoint them as class representatives:

13 A national class of all persons currently and in the future (1) who have or
14 will have an application for adjustment of status pending before USCIS,
15 (2) that is subject to CARRP or a successor “extreme vetting” program, and
16 (3) that has not been or will not be adjudicated by USCIS within six months
17 of having been filed.

18 (*Id.*)³ For simplicity, the Court refers to the second putative class as the
19 “Adjustment Class.”

20 ² Defendants make much of the fact that Plaintiffs challenge a potential successor program.
21 Given the apparent background of CARRP, this is understandable. As Plaintiffs explain in the
22 second amended complaint, “USCIS did not make information about CARRP public, and the
23 program was only discovered through fortuity during federal court litigation. To the extent the
24 program has shifted in name, scope, or method, Plaintiffs may have no way to obtain that
25 information. Thus, Plaintiffs’ reference to ‘CARRP’ incorporates any similar non-statutory and
26 sub-regulatory successor vetting policy, including pursuant to Sections 4 and 5 of [E.O. 13780].”
(Dkt. No. 47 at ¶ 19, n.1.)

³ In Plaintiffs’ first amended complaint they asserted an additional “Muslim Ban Class,” relating
to the effect of Section 3(c) of E.O. 13769. (Dkt. No. 17.) In Plaintiffs’ second amended
complaint, they preserved the assertion of the “Muslim Ban Class” relating to the effect of
Section 2(c) of E.O. 13780. (Dkt. No. 47.) Due to recent court orders enjoining E.O. 13780, *see*
footnote 1, *supra*, Plaintiffs do not seek certification of the “Muslim Ban Class” at this time, but
“reserve the right to seek certification of the additional class if circumstances change again.”
(Dkt. No. 49 at 9–10, n.1.)

II. DISCUSSION

A. Defendant's Motion to Dismiss (Dkt. No. 56)

Defendants move to dismiss Plaintiffs' claims in part under Federal Rule of Civil Procedure 12(b)(1) and in part under Federal Rule of Civil Procedure 12(b)(6). Under Rule 12(b)(1), Defendants ask the Court to dismiss all claims for lack of a case or controversy, and Claims One, Two, Three, Five, Six, and Ten for lack of standing. (Dkt. No. 56 at 10–11.) Under Rule 12(b)(6), Defendants request dismissal of Claims Four, Seven, Eight, Nine, and “extreme vetting” claims for failure to state a claim upon which relief may be granted. (*Id.* at 11.) For the following reasons, Defendants' motion to dismiss is **GRANTED** as to Claim Four for the Adjustment Class only. The remainder of Defendants' motion to dismiss is **DENIED**.

1. Standard of Review

A defendant may move to dismiss an action for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A 12(b)(1) challenge to jurisdiction may be facial or factual. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). “The district court resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor,” and then determining whether they are legally sufficient to invoke jurisdiction. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (citing *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013)). A factual attack, on the other hand, challenges the facts that serve as the basis for subject matter jurisdiction. In evaluating a factual attack, a court may look beyond the complaint without converting the motion into one for summary judgment. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

A defendant may also move for dismissal when a plaintiff “fails to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). On a 12(b)(6) motion to dismiss, the Court accepts all factual allegations in the complaint as true and construes

1 them in the light most favorable to the non-moving party. *Vasquez v. L.A. County*, 487
2 F.3d 1246, 1249 (9th Cir. 2007). However, to survive a motion to dismiss, a plaintiff
3 must cite facts supporting a “plausible” cause of action. *Bell Atlantic Corp. v. Twombly*,
4 550 U.S. 544, 555–56 (2007). A claim has “facial plausibility” when the party seeking
5 relief “pleads factual content that allows the Court to draw the reasonable inference that
6 the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 672
7 (2009) (internal quotations omitted). “Dismissal for failure to state a claim is appropriate
8 only if it appears beyond doubt that the non-moving party can prove no set of facts in
9 support of his claim which would entitle him to relief.” *Vasquez*, 487 F.3d at 1249
10 (internal quotations omitted).

11 **2. Case or Controversy**

12 Defendants ask this Court to dismiss Plaintiffs’ case in its entirety for lack of a
13 case or controversy because Plaintiffs admit they have no interest in adjudication of their
14 applications. (Dkt. No 56 at 18.) Defendants maintain that Plaintiffs “want only a
15 determination that CARRP is unlawful, and an injunction preventing Defendants from
16 applying it to the proposed class members.” (Dkt. No. 56 at 18 (citing Dkt. No. 26 at
17 15)). Defendants ask this Court to exercise its discretion and consider Plaintiffs’
18 statement as a judicial admission, and find that because Plaintiffs have no interest in the
19 adjudication of their claims, there is no case or controversy, which therefore deprives this
20 Court of jurisdiction on standing grounds. (Dkt. No. 56 at 18–19.) This argument fails for
21 three reasons.

22 First, what Plaintiffs actually said in the cited brief is that they are not asking the
23 Court to adjudicate their individual immigration applications. (Dkt. No. 26 at 9.)
24 Therefore, what Defendants are actually asking this Court to do is consider *their*
25 *interpretation* of a portion of Plaintiffs’ first motion to certify class (Dkt. No. 26) and
26 conclude it is a judicial admission. This the Court will not do.

1 Second, Defendants misconstrue Plaintiffs' claims. While Plaintiffs do want a
2 determination that CARRP is unlawful, they also seek an order compelling USCIS to
3 "adjudicate Plaintiffs' and proposed class members' petitions, applications, or requests
4 based solely on the statutory criteria." (Dkt. No. 47 at 51.)

5 Third, as Plaintiffs point out, "adjudicating the named Plaintiffs' applications does
6 not resolve the core issue in this case: whether CARRP and any successor 'extreme
7 vetting' program is lawful." (Dkt. No. 58 at 14.) Defendants' contention that this Court
8 does not have jurisdiction for want of case or controversy fails. Defendants' motion to
9 dismiss on this ground is **DENIED**.

10 **3. Claims One, Two, Three, Five, Six, and Ten**

11 Defendants next move to dismiss Claims One, Two, Three, Five, Six, and Ten for
12 lack of standing. (Dkt. No 56 at 19.) Standing consists of three elements: the plaintiff
13 (1) must have suffered an injury in fact, (2) that is fairly traceable to the challenged
14 conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial
15 decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Once a party
16 asserts the absence of subject matter jurisdiction, the opposing party invoking the court's
17 jurisdiction bears the burden of proving it exists. *Kokkonen v. Guardian Life Ins. Co. of*
18 *Am.*, 511 U.S. 375, 377 (1994).

19 *a. Claims One, Two, Three, Five, and Six*

20 Defendants first argue that Plaintiffs have not suffered an injury in fact as to
21 claims One, Two, Three, Five, and Six because Executive Order (E.O.) 13780 "does not
22 suspend the adjudication of immigrant benefit applications by persons within the United
23 States, and USCIS has not suspended the adjudication of Plaintiffs' benefit applications
24 pursuant to E.O. 13780." (Dkt. No. 56 at 19.) Specifically, Defendants point to Plaintiffs'
25 notice of related cases, (Dkt. No. 22), in which they acknowledged that these claims
26 "may become moot." (Dkt. No. 56 at 10, 19.) In that notice, Plaintiffs were referring to

1 then-Acting Director of USCIS Lori Scialabba’s memo regarding E.O. 13769—the
2 predecessor to E.O. 13780—in which she stated that E.O. 13769 “does not affect USCIS
3 adjudication of applications and petitions filed for or on behalf of individuals in the
4 United States regardless of their country of nationality.” (Dkt. No. 22 at 2–3; Dkt. No.
5 56-1.) Defendants argue that because adjudication of Plaintiffs’ applications have not
6 been suspended pursuant to E.O. 13780, they have not suffered an injury.

7 The Court makes three observations in response to Defendants’ arguments. First,
8 Plaintiffs stated only that their claims *may* be moot, and made such statements prior to the
9 president issuing E.O. 13780. Second, Acting Director Scialabba’s memo pertained to
10 E.O. 13769, which was rescinded by E.O. 13780, and therefore no longer has relevance.

11 Third, Plaintiffs’ claims do establish an injury in fact. Claims One and Two allege
12 that Defendants have interpreted the first E.O. and “will interpret the Second EO to
13 authorize the suspension” of immigration applications. (Dkt. No. 47 at ¶ 251, 257.) Claim
14 Three, which is based on the Establishment Clause, alleges that the “Second EO is
15 intended to target a specific religious faith—Islam,” because Defendants are “not
16 pursuing a course of neutrality with regard to different religious faiths.” (Id. at ¶ 261.)
17 Claim Five is a Due Process challenge based on Plaintiffs being “denied immigration
18 benefits for which they are statutorily eligible, and to which they are entitled by law.” (Id.
19 at ¶ 266.) Claim Six alleges an Equal Protection violation in that Defendants’ indefinite
20 suspension of applications under CARRP and E.O. 13780 discriminates on the basis of
21 “country of origin” and is “substantially motivated by animus toward—and has a
22 disparate effect on—Muslims.” (Id. at ¶¶ 268–69.) Furthermore, even if E.O. 13780 does
23 not suspend the applications, Plaintiffs allege that CARRP or another “extreme vetting”
24 program,⁴ independent of E.O. 13780, suspended Plaintiffs’ applications or will suspend
25 applications of the putative class, and that such suspension was unlawful. This is

26 ⁴ See note 2, *supra*.

1 sufficient to survive a motion to dismiss.

2 Another consideration for the Court is that USCIS has now acted on all of the
3 applications of the named Plaintiffs, after up to three and a half years of inactivity. (Dkt.
4 No. 58 at 11–12.) Curiously, USCIS’s actions on these applications took place almost
5 immediately after Plaintiffs were added as proposed class representatives. To the extent
6 that Defendants argue this fact moots Plaintiffs’ claims, “[i]t is well settled that ‘a
7 defendant’s voluntary cessation of a challenged practice does not deprive a federal court
8 of its power to determine the legality of the practice.’” *Friends of the Earth, Inc. v.*
9 *Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v.*
10 *Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982)). It is the party asserting mootness that
11 has the “heavy burden of persuading” the Court that the challenged conduct will not
12 resume. *Id.* This standard is a “stringent” one, and even “if subsequent events made it
13 absolutely clear that the allegedly wrongful behavior could not reasonably be expected to
14 recur,” a case only “might become moot.” *Id.*

15 Here, Plaintiffs allege this unlawful practice has been ongoing since the inception
16 of the CARRP program in 2008. Plaintiff Wagafe waited three and a half years for action
17 on his application. That prompt action has been taken on Plaintiffs’ applications
18 subsequent to their being named class representatives does not convince the Court that
19 Defendants have met their burden that the alleged unlawful conduct could not reasonably
20 be expected to recur. Furthermore, acting on applications subjected to CARRP—that
21 were highlighted by a lawsuit challenging it—is very different than voluntary cessation of
22 the CARRP program.

23 *b. Claim Ten*

24 Defendants next argue that Plaintiffs lack standing to assert Claim Ten—a
25 violation of the Constitution’s Uniform Rule of Naturalization Clause—because (1) there
26 is no private right of action under the clause, and (2) even if CARRP violated the clause,

1 Congress would be injured, not Plaintiffs. (Dkt. No. 56 at 21–22.)

2 As to Defendants’ first argument, the cases cited do not support it. *Flores v. City*
3 *of Baldwin Park* dealt with a remand issue and whether the Uniform Rule of
4 Naturalization Clause completely preempted state law. 2015 WL 756877, *3 (C.D. Cal.
5 Feb. 23, 2015). *Cazarez-Gutierrez v. Ashcroft* dealt with sentencing. 382 F.3d 905, 912
6 (9th Cir. 2004). And *Korab v. Fink* mentioned the history of the clause but nowhere in
7 that opinion does this Court find the proposition that a private litigant does not have
8 standing to bring suit for its violation. 797 F.3d 572, 580–81 (9th Cir. 2014). In contrast,
9 a naturalization applicant was allowed to challenge a state law which barred
10 naturalization on the basis of homosexuality because “the resulting inconsistencies
11 undermine[d]” the Uniform Rule of Naturalization Clause. *Nemetz v. I.N.S.*, 647 F.2d
12 432, 435 (4th Cir. 1981).

13 Defendants’ second argument—that it is Congress, and not Plaintiffs, that would
14 be injured—also fails. Assuming Congress would be injured by CARRP’s alleged
15 addition of non-statutory and substantive requirements to naturalization, it does not
16 follow that Plaintiffs could not also be injured. For once Congress “establishes such
17 uniform rule [of naturalization], those who come within its provisions are entitled to the
18 benefit thereof as a matter of right, not as a matter of grace.” *See Schwab v. Coleman*,
19 145 F.2d 672, 676 (4th Cir. 1944). Defendants’ motion to dismiss Claims One, Two,
20 Three, Five, Six, and Ten on the basis of standing is **DENIED**.

21 **4. Extreme Vetting Claims**

22 Defendants argue that Plaintiffs’ claims “concerning ‘extreme vetting’ under E.O.
23 13780 must be dismissed” for failure to allege sufficient facts to support them. (Dkt. No.
24 56 at 22.) While the Court agrees that any claims about enjoining a potential future
25 extreme vetting program may be premature, Defendants do not direct the Court to any
26 specific claims for relief that must be dismissed. The only claim for relief that even

1 mentions “extreme vetting”⁵ is Claim Four. (Dkt. No. 47 at ¶ 263.) This claim alleges a
2 Due Process violation for failure to give Plaintiffs and members of the putative classes
3 “notice of their classification under CARRP (or successor ‘extreme vetting’ program), a
4 meaningful explanation of the reason for such classification, and any process by which
5 Plaintiffs can challenge their classification.” (*Id.*) The Court cannot enjoin a program that
6 is currently nonexistent; if the Court ultimately enjoins CARRP, and Defendants
7 implement a successor program substantially similar to CARRP,⁶ such conduct would be
8 in violation of the Court’s injunction. The main thrust of this case is the legality of
9 CARRP. The Court will not dismiss Plaintiffs’ claims because they include allegations of
10 a possible future and unlawful program that would embody CARRP in all but name.

11 **5. Claim Four**

12 Defendants next argue that Plaintiffs’ Fourth Claim for relief, which alleges a Due
13 Process violation, should be dismissed because Plaintiffs have not been deprived of a
14 protected liberty or property interest. (Dkt. No. 56 at 23.)

15 Procedural Due Process claims “hinge[] on proof of two elements: (1) a
16 protect[ed] liberty or property interest . . . and (2) a denial of adequate procedural
17 protections.” *Foss v. Nat’l Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998).
18 Given CARRP’s apparently clandestine nature, and a lack of opposition from Defendants
19 on this point, the second element is met. Thus, the issue is whether Plaintiffs have
20 asserted a protected liberty or property interest in having their applications adjudicated
21 lawfully. “To have a property interest in a benefit, a person clearly must have more than
22 an abstract need or desire for it. He must have more than a unilateral expectation of it. He

23
24 ⁵ Two of the proposed classes in the second amended complaint—but not the motion for class
25 certification—contain “extreme vetting” in their title, but bear no relevance to the motion to
dismiss.

26 ⁶ As Plaintiffs point out, due to the secretive nature of CARRP, it is plausible such a program is
already in existence. (Dkt. No. 47 at ¶¶ 19 n.1, 59.)

1 must, instead, have a legitimate claim of entitlement to it.” *Bd. of Regents of State Colls.*
2 *v. Roth*, 408 U.S. 564, 577 (1972).

3 The Ninth Circuit, and other courts, have held that naturalization applicants have a
4 property interest in seeing their applications adjudicated lawfully. *Brown v. Holder*, 763
5 F.3d 1141, 1147 (9th Cir. 2014); *see also Ching v. Mayorkas*, 725 F.3d 1149, 1155 (9th
6 Cir. 2013) (finding a constitutionally protected interest in nondiscretionary immigration
7 applications); *I.N.S. v. Pangilinan*, 486 U.S. 875, 884 (1988) (noting there is no
8 discretion to deny naturalization if an applicant is otherwise qualified); *Schwab*, 145 F.2d
9 at 676–77 (“[T]hose who come within [the Uniform Rule of Naturalization] are entitled
10 to the benefit thereof as a matter of right[.]”); *United States v. Shanahan*, 232 F.169, 171
11 (E.D. Pa. 1916) (“It is, of course, true that . . . admission to citizenship . . . is not a right,
12 but a privilege When an applicant has met all the requirements of the law, the
13 privilege accorded him ripens into a right . . . he is entitled to citizenship.”). As the
14 United States Supreme Court explained nearly 100 years ago:

15 The opportunity to become a citizen of the United States is said to be merely
16 a privilege, and not a right. It is true that the Constitution does not confer
17 upon aliens the right to naturalization. But it authorizes Congress to establish
18 a uniform rule therefor. Article 1, Sec. 8, cl. 4. The opportunity having been
19 conferred by the Naturalization Act, there is a statutory right in the alien to
submit his petition and evidence to a court, to have that tribunal pass upon
them, and, if the requisite facts are established, to receive the certificate.

20 *Tutun v. United States*, 270 U.S. 568, 578 (1926).

21 Defendants counter that “no alien has the slightest right to naturalization.” (Dkt.
22 No. 56 at 24 (quoting *Fedorenko v. United States*, 449 U.S. 490, 506 (1981)). However,
23 Defendants’ citation of *Fedorenko* omits a significant portion of the quote. The complete
24 citation reads, ““No alien has the slightest right to naturalization *unless all statutory*
25 *requirements are complied with.*”” *Fedorenko*, 449 U.S. at 506 (quoting *United States v.*
26 *Ginsberg*, 243 U.S. 472, 474–75 (1917)) (emphasis added). Here, Plaintiffs allege that all

1 the statutory requirements have been complied with, and the application of CARRP's
2 extra-statutory requirements deprives Plaintiffs of the right to which they are entitled.
3 This is sufficient to allege a violation of due process. Defendants' motion to dismiss
4 Claim Four is DENIED as to the Naturalization Class.

5 Plaintiffs who seek adjustment of their status is a different matter. "The status of
6 an alien . . . may be adjusted by the Attorney General, in his discretion." 8 U.S.C.
7 § 1255(a). As numerous courts have held, discretionary relief, such as adjustment of
8 status, is not a protected property interest. *Sandoval-Luna v. Mukasey*, 526 F.3d 1243,
9 1247 (9th Cir. 2008); *McCreath v. Holder*, 573 F.3d 38, 41 (1st Cir. 2009); *Hamdan v.*
10 *Gonzales*, 425 F.3d 1051, 1060 (7th Cir. 2005); *Nativi-Gomez v. Ashcroft*, 344 F.3d 805,
11 808 (8th Cir. 2003). Therefore, Plaintiffs who seek an adjustment of status cannot claim a
12 due process violation, and Claim Four is **DISMISSED WITH PREJUDICE** as to the
13 Adjustment Class.

14 Finally, Defendants argue that Plaintiffs do not have a constitutionally protected
15 interest in the pace of their adjudication. (Dkt. No. 56 at 24.) However, this misconstrues
16 Plaintiffs' claims. Plaintiffs' case centers on their allegation that an extra-statutory policy
17 based on discriminatory and illegal criteria is blocking the fair adjudication of
18 immigration benefits of which they are statutorily eligible. (*See* Dkt. No. 58 at 23.) Pace
19 of the adjudication is a byproduct of that allegation, not the allegation itself. The Court
20 therefore will not address Defendants' argument.

21 **6. Claim Seven**

22 Defendants argue that Plaintiffs' Claim Seven—that CARRP violates the INA—
23 must be dismissed because the INA does not create a private right of action, and therefore
24 Plaintiffs lack standing. (Dkt. No. 56 at 26.) The Court need not decide whether Congress
25 has implied a private right of action under the INA, because Plaintiffs are challenging
26 agency action. Section 10(a) of the Administrative Procedure Act (APA) provides a right

1 of action for plaintiffs who challenge administrative action that violates a federal statute.
2 Any “person . . . adversely affected or aggrieved by agency action within the meaning of
3 a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702; *see also*
4 *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1176–77 (9th Cir. 2004) (“[T]he end result is the
5 same whether the underlying statute grants standing directly or whether the APA
6 provides the gloss that grants standing. In both cases, the plaintiff can bring suit to
7 challenge the administrative action in question. In the first case, the substantive statute
8 grants statutory standing directly to the plaintiff. In the second case, the substantive
9 statute is enforced through Section 10(a) of the APA.”); *Hernandez-Avalos v. I.N.S.*, 50
10 F.3d 842, 846 (10th Cir. 1995) (“[A] plaintiff who lacks a private right of action under
11 the underlying statute can bring suit under the APA to enforce the statute.”). The proper
12 question for the Court, therefore, is whether Section 10(a) of the APA applies to
13 Plaintiffs’ suit.

14 Whether Section 10(a) applies to a given suit turns on whether a plaintiff is
15 “arguably within the zone of interests to be protected or regulated by the statute or
16 constitutional guarantee in question.” *Ass’n of Data Processing Serv. Orgs., Inc. v.*
17 *Camp*, 397 U.S. 150, 153 (1970). The “‘zone of interests’ test is ‘not meant to be
18 especially demanding,’ and a court should deny standing only ‘if the plaintiff’s interests
19 are so marginally related to or inconsistent with the purposes implicit in the statute that it
20 cannot reasonably be assumed that Congress intended to permit the suit.’” *Cetacean*, 386
21 F.3d at 1177 (quoting *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987)). The
22 “benefit of any doubt goes to the plaintiff.” *Match-E-Be-Nash-She-Wish Band of*
23 *Pottawatomí Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012). Under this standard, it is
24 arguable that those applying for immigration benefits fall within the zone of interests of
25 the statute that sets forth the requirements for obtaining those benefits. Accordingly,
26 Defendants’ motion to dismiss Plaintiffs’ Claim Seven is **DENIED**.

7. Claim Eight

Defendants move the Court to dismiss Plaintiffs' Claim Eight—that CARRP is a final agency action that is arbitrary and capricious and in violation of the INA and USCIS's statutory authority—for failure to state a claim because it does not relate to a final agency action. (Dkt. No. 56 at 29.)

Under the APA, for an agency action to be reviewable, it must be final. 5 U.S.C. § 704. An action is final if it (1) "mark[s] the 'consummation' of the agency's decision-making process," and (2) is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennet v. Spear*, 520 U.S. 154, 178 (1997) (quoting *Port of Boston Marine Terminal Ass'n. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

Defendants argue that "the CARRP handling process" and the delays caused by CARRP are not final agency actions. However, Defendants again misrepresent Plaintiffs' claim. Plaintiffs allege that CARRP—the policy itself—is a final agency action, "not any one applicant's adjudication thereunder." (Dkt. No. 58 at 30; Dkt. No. 47 at ¶ 280.) The Court therefore analyzes whether the overall CARRP policy, its inception and implementation, constitutes final agency action under the *Bennet* test.

Plaintiffs allege that USCIS initiated CARRP in 2008, and since that time, it has been responsible for delaying and denying thousands of immigration applications. (See Dkt. No. 47 at ¶¶ 55–97.) The first prong is met because CARRP is an active program implemented by the agency and represents the culmination of USCIS's decision making process. The implementation of CARRP affects the thousands of applicants whose qualified applications are allegedly indefinitely delayed or denied without explanation. The second prong is met because this results in distinct legal consequences. The Court therefore finds that CARRP is a final agency action. Defendants' motion to dismiss Claim Eight is **DENIED**.

1 **8. Claim Nine**

2 Finally, Defendants move to dismiss Plaintiffs’ Claim Nine—that CARRP was not
3 properly subjected to the notice-and-comment procedure—because it is not a substantive
4 or legislative rule. Under the APA, an agency may issue a “legislative rule” only by using
5 the APA’s notice-and-comment procedure. 5 U.S.C. § 553 (b), (c); *Hemp Indus. Ass’n v.*
6 *DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003). Failure to implement the notice-and-comment
7 procedure invalidates the resulting regulation. *See Paulsen v. Daniels*, 413 F.3d 999,
8 1008 (9th Cir. 2005). Exempt from this rule, however, are “interpretive rules, general
9 statements of policy, or rules of agency organization, procedure or practice.” 5 U.S.C.
10 § 553(b)(3)(A); *Mora-Meraz v. Thomas*, 601 F.3d 933, 939 (9th Cir. 2010). Defendant’s
11 motion to dismiss Claim Nine therefore turns on whether CARRP is classified as an
12 interpretive rule or substantive rule.

13 “For purposes of the APA, substantive rules are rules that create law . . . imposing
14 general, extrastatutory obligations pursuant to authority properly delegated by Congress.”
15 *S. Cal. Edison Co. v. F.E.R.C.*, 770 F.2d 779, 783 (9th Cir. 1985). On the other hand, “the
16 critical feature of interpretive rules is that they are ‘issued by an agency to advise the
17 public of the agency’s construction of the statutes and rules which it administers.’” *Perez*
18 *v. Morg. Bankers Ass’n*, 135 S. Ct. 1199, 1204 (2015) (quoting *Shalala v. Guernsey*
19 *Memorial Hospital*, 514 U.S. 87, 99 (1995)). In the Ninth Circuit, a substantive or
20 legislative rule will be found “(1) when, in the absence of the rule, there would not be an
21 adequate legislative basis for enforcement action; (2) when the agency has explicitly
22 invoked its general legislative authority;[⁷] or (3) when the rule effectively amends a
23 prior legislative rule.” *Hemp Indus.*, 333 F.3d at 1087 (citing *Am. Mining Congress v.*
24 *Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993)).

25
26 ⁷ The parties agree that the second element does not apply here and the Court will not consider it.

1 Defendants argue that the statutes and regulations already in place in the INA, 8
2 U.S.C. §§ 1255, 1357(b), 1423–1427, and 1429, “constitute an adequate legislative basis
3 for USCIS to undertake the procedural steps laid out by CARRP in the adjudication of
4 benefit applications.” (Dkt. No. 56 at 31.) The Court finds that the sections cited of the
5 INA do not support Defendants’ argument. For example, Defendants maintain that
6 because 8 U.S.C. § 1446(a) requires a “personal investigation of the person applying for
7 naturalization,” an adequate legislative basis for CARRP exists. (Dkt. No. 56 at 31.)
8 However Plaintiffs’ allegations suggest that CARRP goes well beyond a personal
9 investigation and instead “creates a separate substantive regime for immigration
10 application processing and adjudication.” (Dkt. No. 58 at 28; Dkt. No. 47 at ¶ 95.)
11 Plaintiffs allege that “[u]nder CARRP, non-statutory indicators of a national security
12 concern include travel through or residence in areas of known terrorist activity; a large
13 scale transfer or receipt of funds; a person’s employment, training, or government
14 affiliations . . . [;] or other suspicious activities.” (Dkt. No. 47 at ¶ 74.) Those indicators
15 alone may seem like reasonable considerations under a “personal investigation.”
16 However, the allegation that the presence of such an indicator therefore labels the
17 application as a “national security concern” and “forbids USCIS from granting the
18 requested benefit,” (*id.* at ¶ 92) and guides “officers to deny such applications . . . or
19 delay adjudication as long as possible,” (*id.* at 77), taken as true, transports CARRP into
20 the realm of the substantive.

21 Addressing the third part of the framework, Defendants argue that CARRP does
22 not amend a prior legislative rule but rather “is a process to vet cases with an articulable
23 link to national security concerns and to determine the proper adjudicative action to take
24 within statutory limits.” (Dkt. No. 56 at 32.) The Court disagrees. The INA already
25 contains indicators of national security concerns for those seeking lawful permanent
26 resident status, asylum, or a visa. 8 U.S.C. §§ 1182(a)(3)(A), (B), and (F), 1227(a)(4)(A)

1 and (B). Taking Plaintiffs’ allegations as true, CARRP goes beyond these statutory
2 indicators. CARRP would therefore effectively amend a prior legislative rule.

3 Finally, the Court notes that because CARRP only came to light through litigation
4 and FOIA requests, (*see* Dkt. No. 47 at ¶ 59), its issuance cannot be said to be
5 interpretive because it “advise[d] the public of” nothing. *See Perez*, 135 S. Ct. at 1204.
6 Accordingly, the Court finds that Plaintiffs allege sufficient facts to support their claim
7 that CARRP is a substantive rule subject to the notice-and-comment procedure of the
8 APA. Defendants’ motion to dismiss Claim Nine is **DENIED**.

9 For the foregoing reasons, the Court **GRANTS IN PART and DENIES IN**
10 **PART** Defendants’ motion to dismiss (Dkt. No. 56). It is granted in that Claim Four is
11 **DISMISSED** as to the Adjustment Class only. It is **DENIED** in all other respects.

12 **9. Plaintiffs’ Amended Motion for Class Certification (Dkt. No. 49)**

13 **1. Legal Standard for Class Certification**

14 A party seeking to litigate a claim as a class representative must affirmatively
15 satisfy the requirements of Federal Rule of Civil Procedure 23(a) and the requirements of
16 at least one of the categories under Rule 23(b). *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S.
17 338, 345 (2011); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012). In
18 determining whether the plaintiffs have carried this burden, the Court must conduct a
19 “rigorous analysis.” *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). This
20 inquiry may “entail some overlap with the merits of the plaintiff’s underlying claim[,]”
21 though the Court considers the merits only to the extent that they overlap with the
22 requirements of Rule 23 and allow the Court to determine the certification issue on an
23 informed basis. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011). The
24 ultimate decision to certify a class is within the Court’s discretion. *Vinole v. Countrywide*
25 *Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009).

2. Rule 23(a) Requirements

Rule 23(a) requires that one or more members of a class may sue as a representative plaintiff only if (1) the class is so numerous that joinder is impracticable; (2) there are common questions of law or fact to the class; (3) the claims or defenses of representative parties are typical of those of the class; and (4) the representatives will fairly and adequately protect the interests of the absent class members. Fed. R. Civ. P. 23(a); *See also Mazza*, 666 F.3d at 588 (Rule 23(a) requires “numerosity, commonality, typicality and adequacy of representation”). Defendants contest certification on commonality, typicality, and adequacy grounds. (Dkt. No. 60 at 13.) Because a rigorous analysis is required regardless of a defendant’s opposition, the Court addresses each requirement independently. However, the Court first addresses Defendants’ more general opposition to class certification on standing grounds.

Defendants oppose class certification because “[a] named plaintiff cannot represent a class alleging [] claims that the named plaintiff does not have standing to raise.” (*Id.*) (quoting *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1238 (9th Cir. 2001)). Defendants argue that the named Plaintiffs, and all proposed class members, lack standing to challenge (1) CARRP, because “they have disclaimed any interest in obtaining decisions on their pending applications, and (2) an “extreme vetting” program under E.O. 13780, because they have not suffered an injury. (*Id.*)

As to the first argument, the Court has already concluded the Plaintiffs have standing to challenge CARRP. *See* Section II(A)(2)(a) and (b), *supra*. Regarding any “extreme vetting” program, Defendants are correct that Plaintiffs may not have not suffered any injury because Plaintiffs are unaware if such program currently exists. However, as discussed above, Plaintiffs’ allegations regarding an “extreme vetting” program safeguard against the Government doing away with CARRP and reinstituting a substantially similar program under a different name, either in an effort to moot

1 Plaintiffs' claims, or insulate CARRP from judicial review. *See* Section II(A)(2)(c),
2 *supra*. As Plaintiffs correctly point out, "[t]o the extent any 'extreme vetting' policy
3 developed pursuant to the Second EO expands or continues CARRP, it will suffer from
4 the same legal deficiencies as CARRP itself." (Dkt. No. 49 at 13–14.) Thus, while the
5 Court cannot preemptively enjoin an "extreme vetting" program, it could enjoin CARRP.
6 If that happens, an "extreme vetting" program developed pursuant to E.O. 13780, which
7 suffers from the same legal deficiencies as CARRP, would violate this Court's order.

8 *a. Numerosity*

9 Rule 23(a)'s first requirement is satisfied when the proposed class is sufficiently
10 numerous to make joinder of all members impracticable. Fed. R. Civ. P. 23(a)(1).⁸ The
11 numerosity requirement requires the examination of the specific facts of each case,
12 though "in general, courts find the numerosity requirement satisfied when a class
13 includes at least 40 members." *Rannis v. Recchia*, 380 Fed. App'x 646, 651 (9th Cir.
14 2010); *see also* *Troy v. Kehe Food Distribs., Inc.*, 276 F.R.D. 642, 652 (W.D. Wash.
15 2011) (certifying a class of 43 to 54 workers). Here, between July 1, 2013 and September
16 20, 2013, USCIS reported 2,644 pending applications subjected to CARRP. (Dkt. No. 27-
17 1 at 164–169.) The putative class likely contains thousands of members. (Dkt. No. 114 at
18 4; Dkt. No. 51 at 25.) The Court finds that the numerosity requirement is met.

19 *b. Commonality*

20 Under Rule 23(a)(2)'s commonality requirement, a plaintiff must demonstrate that
21 the "class members' claims 'depend upon a common contention' such that 'determination
22 of its truth or falsity will resolve an issue that is central to the validity of each claim in
23 one stroke.'" *Mazza*, 666 F.3d at 588 (quoting *Dukes*, 564 U.S. at 350). The key inquiry
24 is not whether the plaintiffs have raised common questions, but whether "class treatment
25 will 'generate common *answers* apt to drive the resolution of the litigation.'" *Abdullah v.*

26 ⁸ Defendants do not dispute numerosity. (*See generally* Dkt. No. 63.)

1 *U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (quoting *Dukes*, 564 U.S. at
2 350) (emphasis in original). Every question of law or fact need not be common to the
3 class. Rather, all Rule 23(a)(2) requires is “a single significant question of law or fact.”
4 *Id.* (quotation omitted); *see also Meyer v. Portfolio Recovery Assocs.*, 707 F.3d 1036,
5 1041–42 (9th Cir. 2012). The existence of “shared legal issues with divergent factual
6 predicates is sufficient, as is a common core of salient facts coupled with disparate legal
7 remedies within the class.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir.
8 1998) (amended).

9 Plaintiffs posit that their claims present numerous common factual and legal
10 issues, including whether:

- 11 • CARRP violates the INA by creating additional, non-statutory, substantive
- 12 criteria that must be met prior to a grant of immigration benefits;
- 13 • CARRP violates the APA as a final agency action that is arbitrary and
- 14 capricious, exceeds statutory authority, and violates the Constitution;
- 15 • CARRP constitutes a substantive rule and is therefore unenforceable for failure
- 16 to provide a notice-and-comment period prior to implementation;
- 17 • CARRP violates the Uniform Rule of Naturalization, Article I, Section 8,
- 18 Clause 4 of the Constitution; and
- 19 • CARRP violates the Due Process Clause of the Fifth Amendment.

20 (Dkt. No. 49 at 19–20.)

21 Defendants argue that “[a]t the heart of this case is the allegation that USCIS has
22 unreasonably delayed adjudicating” immigration applications and resolution of this
23 allegation requires a “fact-intensive, individualized inquiry into the causes of the delay in
24 each case.” (Dkt. No. 60 at 15.) This is incorrect. Plaintiffs’ claim is that CARRP is an
25 unlawful program. A byproduct of CARRP’s alleged unlawful program is unreasonable
26 delays.

27 The common question here is whether CARRP is lawful. The answer is “yes” or
28 “no.” The answer to this question will not change based on facts particular to each class
29 member, because each class member’s application was (or will be) subjected to CARRP.

1 Therefore, “a classwide proceeding” will “generate common answers apt to drive the
2 resolution of the litigation.” *See Troy*, 276 F.R.D. at 652–53. The commonality
3 requirement is met.

4 *c. Typicality*

5 Plaintiffs must next show that their claims are typical of the class. Fed. R. Civ. P.
6 23(a)(3). “The test of typicality ‘is whether other members have the same or similar
7 injury, whether the action is based on conduct which is not unique to the named
8 Plaintiffs, and whether other class members have been injured by the same course of
9 conduct.’” *Ellis*, 657 F.3d at 984 (internal quotation omitted). The commonality and
10 typicality inquiries, which “tend to merge,” both serve as “guideposts for determining
11 whether under the particular circumstances maintenance of a class action is economical
12 and whether the named plaintiff’s claim and the class claims are so interrelated that the
13 interests of the class members will be fairly and adequately protected in their absence.”
14 *Dukes*, 131 S. Ct. at 2551, n.5 (quotations and citation omitted). Ultimately,
15 representative class claims are typical if they are “reasonably co-extensive with those of
16 absent class members; they need not be substantially identical.” *Hanlon*, 150 F.3d at
17 1020; *see also Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (noting the
18 “permissive” nature of the typicality inquiry).

19 Plaintiffs maintain that their claims are typical of the proposed classes because
20 “they proceed under the same legal theories, seek the same relief, and have suffered the
21 same injuries.” (Dkt. No. 49 at 21.) Defendants counter that because the named Plaintiffs
22 allege they are fully eligible for the benefits they seek, and the same cannot be said for
23 every member of the class, the named Plaintiffs are atypical of the class they seek to
24 represent. (Dkt. No. 60 at 21.) However, Rule 23(a)(3) requires that the claims of class
25 representatives be similar to claims of the class. Plaintiffs are not seeking specific
26 adjudication of their applications, only that USCIS adjudicate applications “based solely

1 on the statutory criteria,” and not pursuant to CARRP. (Dkt. No. 47 at 51.) Whether any
2 particular Plaintiff or putative class member were statutorily eligible for the benefits
3 sought is not determinative of typicality. Further, if an applicant were statutorily
4 ineligible under the INA, then submitting such an application to CARRP would be
5 redundant, and grounds for denial already exist.

6 The relevant claim for the typicality inquiry is whether subjecting a Plaintiff’s
7 immigration application to CARRP is lawful. The class definitions include only
8 immigration benefit applicants whose applications have been submitted to CARRP.
9 Defendants do not claim that any of the proposed class representatives did not have their
10 application submitted to CARRP. Accordingly, the typicality requirement is met.

11 *d. Adequacy*

12 Finally, Rule 23(a)(4) requires that the named plaintiff “fairly and adequately”
13 protect the interests of the class. Fed. R. Civ. P. 23(a)(4). To determine whether the
14 representative parties will adequately represent a class, the Court must examine (1)
15 whether the named plaintiff and her counsel have any conflicts of interest with other class
16 members; and (2) whether the named plaintiff and her counsel will prosecute the action
17 vigorously on behalf of the class. *Ellis*, 657 F.3d at 985 (citing *Hanlon*, 150 F.3d at
18 1020). As the Ninth Circuit has noted, adequate representation depends upon “an absence
19 of antagonism between representatives and absentees[] and a sharing of interest between
20 representatives and absentees.” *Ellis*, 657 F.3d at 985 (quotations and citation omitted).

21 Plaintiffs contend that the five named Plaintiffs are adequate representatives
22 because “there is no tension between their interests and those of the absent class members
23 they seek to represent.” (Dkt. No. 63 at 11.) The class members’ interests all focus on
24 challenging CARRP and preventing it from being applied to their or other class
25 members’ immigration applications. Further, the named Plaintiffs are all willing to
26 prosecute this action vigorously. (Dkt. Nos. 28, 29, 50, 51, and 52.)

1 Defendants contest adequacy on three grounds. First, Defendants argue that the
2 named Plaintiffs are inadequate representatives because there may be many putative class
3 members who are aware that their applications have been pending a long time, and who
4 would prefer to let the process “run its course.” (Dkt. No. 60 at 22.) This ignores the fact
5 that this lawsuit alleges that applicants do not receive notification that their application
6 has been submitted to CARRP, and Defendants have yet to deny such a claim.
7 Defendants presume that there are potential plaintiffs who applied for immigration
8 benefits but “might prefer to allow their applications to remain pending, continuing to
9 live and work in the United States in their current status, rather than risk having USCIS
10 determine they are inadmissible or removable and be placed in removal proceedings.”
11 (*Id.*) This argument is speculative at best, and as such, fails.

12 Second, Defendants repeat their argument regarding the fact that the named
13 Plaintiffs all claim to be eligible for the benefits they seek, and this would put them at
14 odds with putative class members who are ineligible. (*Id.* at 22–23.) The Court addressed
15 this argument above and applies the same reasoning here. Additionally, the Court sees no
16 basis for conflict on underlying eligibility grounds. If CARRP is an unlawful and
17 unconstitutional program to which all putative class members’ applications are submitted,
18 then they all have a shared interest—regardless of eligibility—in putting an end to it.

19 Finally, Defendants argue that the named Plaintiffs are inadequate representatives
20 because they have all had their applications adjudicated, and thus their claims are moot.
21 (Dkt. No. 60 at 24.) However, this argument has the opposite effect and actually
22 persuades the Court that class certification is appropriate.

23 Each named Plaintiff had his or her application acted on almost immediately *after*
24 joining this lawsuit. Assuming that this was merely CARRP and the application process
25 running its due course and that Plaintiffs’ ultimate adjudications happened to coincide
26 with being added as named Plaintiffs—even after their applications lay stagnant for up to

1 four years—class certification would still be appropriate. Defendants’ argument supports
2 the conclusion that Plaintiffs’ claims would appear to be “so inherently transitory that the
3 trial court will not have even enough time to rule on a motion for class certification
4 before the proposed representative’s individual interest expires.” *County of Riverside v.*
5 *McLaughlin*, 500 U.S. 44. 52 (1991) (internal citation omitted). The named Plaintiffs’
6 claims are therefore “capable of repetition, yet evading review.” *Pitts v. Terrible Herbst,*
7 *Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011) (citing *Gerstein v. Pugh*, 420 U.S. 103, 110
8 n.11 (1975)). In such a case, “mooting the putative class representative’s claims will not
9 necessarily moot the class action” even if “the district court has not yet addressed the
10 class certification issue.” *Id.* at 1090.

11 On the other hand, if adjudication of Plaintiffs’ applications is not happenstance,
12 and Defendants are purposely and strategically adjudicating Plaintiffs’ applications as
13 they are added as named Plaintiffs, such a blatant attempt to moot Plaintiffs’ claims will
14 not gain purchase with this Court. If this is true, Defendants appear to be engaging in a
15 strategy of picking off named Plaintiffs to insulate CARRP from meaningful judicial
16 review.

17 Such a strategy is apparently not without precedent. In *Muhanna v. USCIS*, No.
18 14-cv-05995 (C.D. Cal. July 31, 2014), five individual plaintiffs filed suit challenging
19 CARRP. After waiting years for adjudication, all five plaintiffs’ applications were
20 adjudicated within months of filing suit, and the lawsuit was voluntarily dismissed as
21 moot. *Id.*, Dkt. No. 51 (entered Dec. 23, 2014). Similarly, in *Arapi v. USCIS*, No. 16-cv-
22 00692 (E.D. Mo. 2016), 20 individuals filed suit regarding CARRP and their pending
23 naturalization applications. Soon after, USCIS adjudicated all 20 applications, at which
24 point 19 plaintiffs voluntarily dismissed their claims and USCIS moved to dismiss the
25 final plaintiff’s claim as moot. *Id.*, Dkt. No. 22 (filed Dec. 19, 2016).

26 Defendants’ argument that the mooting of named Plaintiffs’ claims requires a

1 finding that they are inadequate representatives, thus defeating class certification, does
2 not have the desired effect. In fact, it counsels in favor of granting class certification. *See*
3 *Ellsworth v. U.S. Bank, N.A.*, 30 F. Supp. 3d 886, 909 (N.D. Cal. 2014) (defendant’s
4 “calculated strategy that includes picking off named Plaintiffs” did not moot class action
5 claims); *Ramirez v. Trans Union, LLC*, 2013 WL 3752591, at *2 (N.D. Cal. July 17,
6 2013) (class certification appropriate where plaintiff’s claims would “evade review” if
7 the defendant were able to “pick off” each subsequent lead plaintiff).

8 Furthermore, despite their applications having been adjudicated by USCIS, the
9 Court remains confident that the named Plaintiffs will “fairly and adequately protect the
10 interests of the class.” Fed. R. Civ. P. 23(a)(4). The Court further finds that Plaintiffs’
11 counsel—attorneys from the ACLU, Law Offices of Stacy Tolchin, National Immigration
12 Project of the National Lawyers Guild, Northwest Immigrant Rights Project, and Perkins
13 Coie—have the experience and ability to vigorously and adequately represent the class.
14 The adequacy requirement is met.

15 **3. Rule 23(b)(2) Requirement**

16 After satisfying the Rule 23(a) prerequisites, a plaintiff must also demonstrate that
17 the case is maintainable as a class action under one of the three Rule 23(b) prongs.
18 Plaintiffs move for class certification under Rule 23(b)(2). (Dkt. No. 49 at 23.) In order to
19 satisfy Rule 23(b)(2), Defendants must “ha[ve] acted or refused to act on grounds that
20 apply generally to the class, so that final injunctive relief or corresponding declaratory
21 relief is appropriate respecting the class as a whole.” Rule 23(b)(2) is met where “a single
22 injunction or declaratory judgment would provide relief to each member of the class.”
23 *Dukes*, 564 U.S. at 360.

24 Here, Plaintiffs allege that CARRP is unlawful and ask the Court to enjoin the
25 Government from submitting putative class members’ immigration applications to
26 CARRP. A single ruling would therefore provide relief to each member of the class.

1 Accordingly, Rule 23(b)(2) is satisfied.

2 Having satisfied the requirements of Federal Rules of Civil Procedure 23(a) and
3 23(b)(2), Plaintiffs' motion for class certification (Dkt. No. 49) is **GRANTED**. The Court
4 approves of the two proposed classes, appoints the five named Plaintiffs as class
5 representatives, and appoints Plaintiffs' counsel as class counsel for both classes.
6 Because certification of anything less than a nationwide class would run counter to the
7 constitutional imperative of "a uniform Rule of Naturalization," U.S. CONST., art. I, § 8,
8 cl. 4, class certification is nationwide.

9 **III. CONCLUSION**

10 For the foregoing reasons, Defendants' motion to dismiss (Dkt. No. 56) is
11 **GRANTED IN PART and DENIED IN PART**, and Plaintiffs' motion for class
12 certification (Dkt. No. 49) is **GRANTED**.

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14 DATED this 21st day of June, 2017.

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19 The Honorable Richard A. Jones
20 United States District Judge
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